

EON BANK BHD**A****v.****KSU HOLDINGS BHD**

HIGH COURT MALAYA, KUALA LUMPUR
HANIPAH FARIKULLAH JC
[SUIT NO: D7-22-788-2003]
12 OCTOBER 2010

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COMPANY LAW: *Directors - Resolutions - Effect of resolutions - Whether merely an internal document empowering company to carry out matters stipulated therein - Whether company is compelled to carry out matters stated in resolution - Whether resolution may amount to an undertaking by company - Whether resolution may be specifically enforced - Whether resolution has binding effect vis-a-vis company and third party*

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CONTRACT: *Guarantee - Corporate guarantee - Whether valid and enforceable guarantee existed - Whether defendant undertook or represented to provide a corporate guarantee - No ad idem between parties on terms and conditions of guarantee - Formal guarantee not executed - No contractual relationship between parties*

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EVIDENCE: *Adverse inference - Evidence Act 1950, s. 114(g) - Failure to call material witnesses - Whether adverse inference would be drawn*

The plaintiff, a licenced financial institution, claimed against the defendant for specific performance of a purported Corporate Guarantee in the sum of RM40,000,000 in favour of the plaintiff, to secure a Term Loan Facility granted to May Plastic Sdn. Bhd. (MPI). The defendant contended that the defendant was never a party or privy to any of the agreement between the plaintiff and MPI prior to the disbursement of the Term Loan Facility. Further, the defendant pleaded that the parties were never ad idem on the terms and conditions of the draft Guarantee and Indemnity and hence there was no agreement between the parties. The primary issue that the court had to determine was whether the defendant undertook ('the Undertaking') to execute a Corporate Guarantee of up to RM40,000,000 in favour of MPI to secure the Term Loan Facility. The plaintiff's case against the defendant was premised on the fact that the defendant breached its Undertaking and representations in failing to execute the Corporate Guarantee. The plaintiff premised its claims on the defendant's resolutions as

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- A evidence to show that the defendant, through its representatives, did
give an Undertaking to execute a corporate guarantee. PW2 testified
that the plaintiff had the defendant's resolution to that effect before
the disbursement of the Term Loan Facility. The plaintiff also
B relied on the defendant's prospectus as corroborative evidence to
show that the defendant did give an undertaking to provide a
corporate guarantee to the defendant.

Held (dismissing the plaintiff's case with costs):

- C (1) Since it was the plaintiff's evidence that one Bernard Foo
(‘Bernard’) and one Ong Boon Poh (‘Ong’) had attended the
relevant meetings representing the defendant, the plaintiff ought
to have called Bernard and Ong to testify that they in fact
attended the meetings and represented the defendant at the
D material time. The defendant denied that Ong and Bernard
were its representatives at the material time. Therefore adverse
inference could be drawn against the plaintiff under s. 114(g) of
the Evidence Act for not calling Bernard and Ong to testify.
The compelling and irresistible conclusion was that the
E defendant's representatives neither attended any of the meetings
nor agreed to give a corporate guarantee to the plaintiff.
(paras 39, 41 & 42)
- (2) The plaintiff's failure to explain how and when exactly they
received the said resolution supported the defendant's position
F that the plaintiff did not have the resolution when it disbursed
the loan. On the balance of probabilities the resolution had not
been given to the plaintiff when the Term Loan was disbursed
to MPI by the plaintiff. Furthermore, the resolution was an
internal document of the defendant authorising and empowering
G the defendant to do and carry out matters stipulated therein. It
did not however require or compel the defendant to do or carry
out any of the matters stated therein. It would therefore be
clearly wrong in law to accept the plaintiff's contention that the
resolution was an undertaking given by the defendant to the
H plaintiff capable of being specifically enforced. By law the
resolution had no legal binding effect *vis-a-vis* the defendant
company and the plaintiff, a third party. It did not create any
legal relationship between the plaintiff and the defendant.
I (paras 52-53 & 56-58)

- (3) On the balance of probabilities, the defendant did not at any time whatsoever enter into any contractual relationship with the plaintiff *vis-a-vis* the Term Loan Facility and neither did it give the plaintiff any undertaking whatsoever to execute a Corporate Guarantee in favour of the plaintiff. (para 59) A
- (4) The plaintiff was an adviser of the proposed scheme and prepared the defendant's prospectus. Thus, the plaintiff not only had full knowledge that the statements were false, they were also responsible for the falsity of the statements. Thus, the statements could not be construed in law, as an undertaking and/or representation given by the defendant to the plaintiff to provide the Corporate Guarantee. (paras 63 & 64) B
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- (5) None of the documents relied on by the plaintiff showed an ad idem between the parties on the terms and conditions of the draft Guarantee and Indemnity. Even the plaintiff contended that the Guarantee was to be executed in a formal agreement. In such a situation nothing short of signing the document by both parties could bring a contract into existence. (paras 76 & 79) D
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- (6) Where there was no written agreement and the fact of the Undertaking was in dispute, the court had to look at all the facts as well as the evidence afforded by contemporaneous documents to attempt to decide the true situation. The evidence as adduced did not support the plaintiff's contention that the defendant had given the Undertaking to the plaintiff. (paras 80 & 81) F

Case(s) referred to:

- Abdul Rahim Syed Mohd v. Ramakrishnan Kandasamy; Wan Ahmad Azlan Wan Majid & Anor (Interveners)* [1996] 3 CLJ 393 HC (**refd**) G
- Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133 SC (**refd**)
- Chan Yoke Lain v. Pacific & Orient Insurance Co Sdn Bhd* [1999] 1 CLJ 179 CA (**refd**)
- Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625 FC (**refd**) H
- CIMB Bank Bhd v. Tan Kim Leong Holdings Sdn Bhd & Ors* [2010] 1 LNS 104 HC (**refd**)
- Crossley v. Maycock* [1874] 43 LJCH 379 (**refd**)
- Daiman Development Sdn Bhd v. Mathew Lui Chin Teck & Another Appeal* [1980] 1 LNS 180 PC (**refd**)
- Ho Kam Phaw v. Fam Sin Nin* [1998] 3 CLJ 708 CA (**refd**) I

- A *Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 4 CLJ 1 CA (**refd**)
Lam Eng Rubber Factory (M) Sdn Bhd v. Lim Beng Yew & Ors [1994] 4 CLJ 376 HC (**fol**)
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC (**refd**)
- B *Pembinaan Bumi Gemilang Sdn Bhd v. RHB Bank Berhad & Anor* [2009] 1 LNS 1006 (**refd**)
Plenitude Holdings Sdn Bhd v. Tan Sri Khoo Teck Puat & Anor [1992] 4 CLJ 1882; [1992] 3 CLJ (Rep) 281 HC (**refd**)
Utama Merchant Bank Bhd v. Dato' Mohd Nadzmi Mohd Salleh [2003] 4 CLJ 859 HC (**refd**)
- C

Legislation referred to:

Evidence Act 1950, s. 114(g)

For the plaintiff - Datin J Kannapperan (Sathya Kumardas with him);

D *M/s Shearn Delamore & Co*

For the defendant - Datuk Pathmanathan (T Selva & Datin Shanti Pathmanathan with him); M/s MP Samy & Co

Reported by Amutha Suppayah

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JUDGMENT**Hanipah Farikullah JC:**

- F [1] The plaintiff, Eon Bank Berhad is a licenced financial institution formerly known as Malaysian Industrial Development Finance Berhad (MIDF). The defendant, KSU Holdings Berhad is a company registered under the Companies Act 1965.
- G [2] The plaintiff claims against the defendant for specific performance of a Corporate Guarantee in the sum of RM40,000,000 in favour of the plaintiff, to secure the Term Loan Facility granted to May Plastic Sdn. Bhd. (MPI).
- H [3] The plaintiff's claim is disputed by the defendant. The defendant contends that the defendant was never a party or privy to any of the agreement between the plaintiff and MPI prior to the disbursement of the Term Loan Facility on 3 September 2000 to MPI. Further, the defendant pleads that the parties were never *ad idem* on the terms and conditions of the draft guarantee and
- I indemnity and hence there was no agreement between the parties.

Agreed Facts

[4] It is not disputed between the plaintiff and the defendant that on 12 July 1996, MIMB and MIDF (“the lenders”) granted a Bank Guarantee Facility (“the BG Facility”) of up to RM41.4 million to MPI, which was utilised by MPI for the purposes of issuance of Bank Guarantee by the lenders to guarantee the payment obligations of MPI under certain bonds that were issued by MPI.

[5] The BG Facility was secured by six (6) securities as listed in Preamble C of the Bond Redemption Facility Agreement dated 20 November 2000 at p. 60 of Bundle A (“the Existing Securities”).

[6] MPI fell into financial difficulties, which resulted in the downgrading of their bond ratings and therefore the bondholders have sought an early redemption of the bonds, which were due to mature on 3 September 2001 and called on the bank guarantee.

[7] The lenders agreed to allow MPI to refrain from making payment on the bank guarantees or taking any action to enforce the Existing Securities so as to give MPI more time to procure an investor (a White Knight) to take over control of MPI and assume its assets and liabilities. In mid 2000, MPI identified the defendant as the White Knight.

[8] On 14 July 2000, MPI wrote to MIMB to request for a Term Loan Facility for the purposes of redeeming the RM40,000,000 bonds issued by MPI to the bondholders. The lenders agreed to grant and avail up to their respective portions a Term Loan Facility of up to RM40,000,000 to MPI to partly finance the early redemption of the RM40,000,000 bonds issued by MPI maturing on 3 September 2001 (“the bonds”) and to extinguish the bank guarantee issued by the lenders in connection with the bonds upon such terms and conditions contained in the agreement.

[9] MIMB’s Letter of Offer dated 14 September 2000 to MPI provides, *inter alia*, that:

- (i) the Term Loan Facility was to be secured by the Existing Securities and the defendant’s guarantee for the repayment of the Facility, including all fees, costs and expenses that are to be settled by MPI; and

- A (ii) it was, *inter alia*, a condition precedent to the Term Loan Facility that MIMB receives a certified true copy of the defendant's Board of Resolution authorising the defendant to provide its Corporate Guarantee in consideration of the facility.
- B [10] The Term Loan Facility was disbursed to MPI on 30 November 2000. The Term Loan was to be fully repaid by MPI on or before 3 September 2001 and MPI was until such date to pay interest at the applicable rates at the date stipulated in the agreement.
- C [11] MPI subsequently entered into a Debt Restructuring Scheme ("the Scheme") pursuant to s. 176 of the Companies Act 1965 with its members and the defendant which was intended, *inter alia*, to result in MPI becoming a wholly owned subsidiary of the defendant.
- D [12] Pursuant to the Scheme being approved by MPI's members and receiving court sanction, the Scheme as proposed was successfully implemented on 10 May 2002. MPI became a wholly owned subsidiary of the defendant and the shares of the defendant were listed and quoted on the Second Board of the Kuala Lumpur Exchange in place of MPI.
- E [13] *Vide* letters dated 10 July 2002 and 22 July 2004, Messrs. Nik Hussein & Partners, solicitors acting for the Lenders sent a draft Corporate Guarantee for the approval and execution of the defendant
- F but the defendant did not execute the same.

The Plaintiff's Case

- G [14] The plaintiff called three witnesses to support its case. Liew Fooi Voon (PW1) is the Vice-President of the Credit Recovery of Eon Bank Berhad, testified that in consideration of the Lenders agreeing to grant the Term Loan to MPI, the defendant did undertake to execute a Corporate Guarantee of up to RM40,000,000 in favour of MIMB, acting as agent for itself and MIDF.
- H [15] According to PW1, it was a term and condition of the Bond Facility Agreement that MPI was to cause the defendant to execute the Corporate Guarantee upon the Scheme being successfully implemented and MPI becoming a wholly owned subsidiary of the defendant.

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[16] Edward Yeong Boon Hong (PW2), previously the Senior Manager, Corporate Banking with MIMB, testified that the defendant's representatives attended various meetings held with the Lenders and MPI during the period of 11 July 2000 to 14 September 2000 and supported MPI's application for the Term Loan Facility. PW2 said that at these meetings, the defendant, through its representatives, agreed to provide its undertaking to execute the Corporate Guarantee of up to RM40,000,000 for the purposes of securing the Term Loan Facility and represented that the Corporate Guarantee would be executed upon successful implementation of the Scheme and MPI becoming a wholly owned subsidiary of the defendant. According to PW2, the lenders relied on the undertaking and representations of the defendant in agreeing to grant the Term Loan to MPI.

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[17] In cross-examination, PW2 admitted that he could not remember the names of the representatives of the defendant who attended the meetings due to lapse of ten (10) years. However, later PW2 explained that Mr. Bernard Foo and Mr. Ong Boon Poh, the defendant's ex-director were amongst the persons representing the defendant at that material time.

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[18] According to PW2, it was *inter alia*, a condition precedent to the Term Loan Facility that MIMB receives a true copy of the defendant's Board of resolution authorizing the defendant to provide its Corporate Guarantee.

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[19] PW2 testified that MIMB has in its possession the original copies of the Defendant's Board of Resolutions dated 14 September 2000, signed by the two (2) directors of the defendant namely Lim Tuck Sing and Syed Ahmad bin Syed Salim (now deceased), resolving that the defendant "in consideration of the lenders agreeing to grant the Term Loan Facility to MPI, undertakes to execute a Corporate Guarantee for up to RM40.0 million in favour of MIMB to secure the said facility upon such terms and conditions as are stipulated in the Deed of Guarantee" and authorising any one of the directors of the company to execute the said Corporate Guarantee for and on behalf of the company.

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[20] When PW2 was referred during cross-examination to the Board's Resolution dated 14 November 2000, PW2 said that he does not know who received the Board's Resolution and he cannot remember whether the defendant received it by hand, post or whether there was a covering letter attached to the resolution.

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A [21] Further, PW2 pointed out that the defendant clearly recognizes in its Prospectus dated 30 March 2003 (p. 264-356 of Bundle A) under s. 10.3, at p. 284 that that one of the contingent liabilities of the defendant was the Corporate Guarantee to be provided by the defendant in favour of the lenders.

B [22] It is the plaintiff's case that the undertaking given by the defendant already sets out the essential terms of the Corporate Guarantee, namely that:

C (i) The identity of the parties to the guarantee – the Corporate Guarantee was to be provided by the defendant, as Guarantor, in favour of MIMB (agent for itself and MIDF), as Guaranteee.

(ii) The amount guaranteed – a sum of up to RM40,000,000

D (iii) The consideration for the guarantee – Lenders agreeing to grant a Term Loan Facility of up to RM40,000,000 Million to MPI for the purposes of financing the early redemption of MPI's RM40,000,000 3.5% Guaranteed Redeemable Bonds maturing on 3 September 2001.

E (iv) The purpose of the guarantee – as security for the Term Loan Facility.

(v) Other terms and conditions – to be contained in a Deed of Guarantee.

F **The Defendant's Case**

G [23] The defendant's first witness Ramachandran a/l Kenaparasi Pillai (PW1) was appointed Chairman of the defendant on 22 August 2005. PW1 testified that there are no records to show that the defendant had prior to or at the time of the disbursement of the Term Loan of RM40,000,000 ever gave or represented to MIMB or MIDF that they would execute a Corporate Guarantee in their favour for RM40,000,000.

H [24] In respect of the defendant's resolution dated 14 September 2000, DW1 testified that it is only an internal document and not a contract because there was no record that the defendant had forwarded a copy to MIMB and MIDF to be acted upon as a contract. According to DW1, the plaintiff could not have disbursed the loan relying on this resolution as the said resolution was never

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in the plaintiff's custody at the time the Term Loan was disbursed to MPI. DW1 pointed out that a copy of the resolution was in fact obtained by the plaintiff only some time in June 2002, more than one and half years after the loan was disbursed. A

[25] To a question from learned counsel for the defendant whether the defendant's letter dated 11 July 2001 (p. 400 of bundle B) and 19 September 2001 (p. 360 of bundle B) can be construed as the defendant giving an undertaking to execute a Corporate Guarantee in favour of MIMB and MIDF, this is what DW1 said in evidence: B

This letter cannot by any stretch of imagination be construed as an undertaking or continuous representation or undertaking by the Defendant to MIMB and MIDF that it would execute the Corporate Guarantee. C

The said letter never stated that the Defendant would execute a Corporate Guarantee to cover the term loan nor could it be construed that the Defendant could execute the same. D

The true purpose of the said letter was to obtain the consent of the Defendant for the deferment of the payment of the term loan by MPI, as the Defendant's consent was required by reason of the Debt Restructuring Scheme. E

As stated earlier, the Defendant was a "White Knight" in the rescue scheme cum debt restructuring of MPI and its consent was needed without any obligation on the part of the Defendant to neither assume this liability nor give any undertaking to the Plaintiff. F

As far as the record of KSUH is concerned it was actually MPI that undertook to procure the agreement of Defendant to execute the Corporate Guarantee upon the finalization of the Debt Restructuring Scheme and the Plaintiff should seek their remedy as against MPI and not the Defendant. G

[26] Lim Tuck Sing (DW2) is a director of the defendant since 7 July 1999. DW2 informed the court that based on cl. 11.3 of the Term Loan Facility Agreement, it was MPI who gave the undertaking to MIMB. DW2 referred to cl. 11.3 of Term Loan Facility Agreement which state as follows: H

In further consideration of the premises herein contained, the Borrower undertakes with the Agent and the Lenders that upon completion of the debt restructuring scheme ("DRS") and KSUH ("the Guarantor") becoming a related company of the Borrower, I

- A the Borrower will immediately cause the Guarantor to executed the Guarantee in favour of the Agent as agent for itself and for the benefit of the Lenders.

[27] DW2 pointed out that even though the resolution was dated 14 September 2000, he admitted that he did not sign it on 14 September 2000. According to DW2, it is impossible for him to have signed the resolution on 14 September 2000 since the Letter of Offer in respect of the Term Loan Facility by MIMB to MPI itself is dated 14 September 2000 and received by MPI on 15 September 2000. The Letter of Offer was not sent to the defendant and neither was a copy extended to the defendant. DW2 testified that MPI only accepted the Letter of Offer on 20 September 2000 (refer to p. 46 BOD).

[28] Further, DW2 clarified that he did not remember the exact date when he signed the resolution but stated that it was probably in late 2000 or early 2001. According to DW2, the resolution was not given to MIMB after signing but was kept by the defendant.

[29] With regard to the Prospectus which contains a statement that the defendant had given a Corporate Guarantee, DW2 explained that the Prospectus is prepared by MIMB, not the defendant. MIMB was the Financial Adviser solely responsible for the statements. DW2 make reference to the Prospectus and he said that at p. 264 BOD, MIMB has given a statement that:

F MIMB acknowledges that, based on all available information, and to the best of its knowledge and relief, this Prospectus constitutes a full and true disclose of all material facts concerning the Offer for Sale and are satisfied that the consolidated profit forecast (for which the Directors of KSUH are fully responsible) prepared for inclusion in this Prospectus have been stated by the Directors of KSUH after due and careful enquiry and have been duty reviewed by the Reporting Accountants, Messrs BOD Binder.

[30] As such, DW2 said that MIMB is responsible for the accuracy of the information in the Prospectus. In this regard, DW2 testified that MIMB has all along known that the defendant has never agreed with MIMB to give a Corporate Guarantee from the defendant.

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[31] Jamaludin bin Mohd Nor (DW3) is the Chief Financial Officer of the defendant. DW3 testified that some time after 10 May 2002, he personally received a request by telephone from someone at MIMB for the extract of the resolution dated 14 September 2000. DW3 told the court that the caller informed him that the bank did not have in their custody copies of the directors' resolution and requested him to fax over to the bank. Subsequently, he faxed the extract of the directors' resolution to MIMB.

Issues

[32] The primary issue that the court has to determine is whether the defendant undertook to execute a Corporate Guarantee of up to RM40,000,000 in favour of MPI to secure the Term Loan Facility.

Evaluation Of Evidence And Findings

[33] The plaintiff's case against the defendant is premised on the fact that the defendant breached its undertaking and representations in failing to execute a Corporate Guarantee of up to RM40,000,000 as security for Term Loan Facility granted to MPI.

[34] As the call recalls, PW2 testified that in consideration of the Lenders agreeing to grant the Term Loan Facility to MPI, the defendant representatives undertook to execute a Corporate Guarantee of up to RM400,000 in favour of MIMB.

[35] The court notes that one glaring contradiction emerged in the course of cross-examination of PW2 by learned counsel for the defendant. PW2 maintained that he cannot remember the names of the defendant's representatives who had given undertaking to the plaintiff that the defendant will execute a Corporate Guarantee. However, when pressed under cross-examination whether the defendant was represented at those meetings, PW2 said that the defendant's representatives Mr. Bernard Foo and Mr. Ong Boon Poh attended various meetings held with the lenders and MPI during the period of 11 July 2000 to 14 September 2000.

[36] The court finds that PW2's evidence that Bernard Foo and Ong Boon Poh were representatives of the defendant at those meeting was not supported by evidence. No records, documents or minutes of the meetings were tendered by the plaintiff to show who the representatives of the defendant who attended the meeting.

A [37] Perhaps it is appropriate to observe that at this point in giving his evidence PW2 seems to be evasive. The court observes that the evasiveness on the part of PW2 was clearly deliberate and in no way could be described an act of a forgetfulness.

B [38] The court notes that with regards to the questions posed by the counsel for the defendant whether Bernard Foo and Ong Boon Poh were representatives of the defendant at the material time, PW2 simply choose not to answer the question and at times he said “I cannot remember”. Even though ten (10) years has lapsed, considering PW2 was the Senior Manager of the plaintiff at the material time and he was the plaintiff’s chief witness, I cannot agree with learned counsel for the plaintiff’s explanation in her written submission that PW2 has trouble in understanding and paying attention to the questions posed. I have perused the notes of the proceedings and finds that the questions posed to him are rather straight forward.

E [39] It is significant to note that since it is the plaintiff’s evidence that Bernard Foo and Ong Boon Poh attended the meeting, the plaintiff ought to have called Bernard Foo and Ong Boon Poh to testify that they in fact attended the meetings and represented the defendant at the material time.

F [40] In the case of *Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 4 CLJ 1 which was followed by the courts in the case of *Utama Merchant Bank Bhd v. Dato’ Mohd Nadzmi Mohd Salleh* [2003] 4 CLJ 859 and in *CIMB Bank Berhad v. Tan Kim Leong Holdings Sdn Bhd & Ors* [2010] 1 LNS 104, the Court of Appeal held as follows:

G He who alleges must prove such allegation and the onus is on the appellant to do so. See section 103 of the Act. Thus, it is incumbent upon the appellant to produce Tan Sri Bashir as his witness to prove the allegation. The fact that the appellant was unable to secure the attendance of Tan Sri Bashir as a witness does not shift the burden to the respondent to produce the witness and testify as to what he had uttered ...

I [41] As far as the defendant is concerned, Ong Boon Poh and Bernard Foo were not the defendant’s representatives at the materials time. In this present case, it is not the defendant’s burden to discharge who they represented. The defendant’s unchallenged evidence is that the defendant did not attend any of the meetings.

[42] Ong Boon Poh and Bernard Foo are the persons who could give the court a firsthand account of all the negotiations between the plaintiff and the defendant. On weighing the evidence very carefully, this court would hold that an adverse inference can be drawn against the plaintiff under s. 114(g) of the Evidence Act for not calling Bernard Foo and Ong Boon Poh to testify. No explanation was given by the plaintiff why Ong Boon Poh or Bernard Foo was not called to give evidence. Bernard Foo and Ong Boon Poh could have cleared the doubt and verified if the defendant had in fact attended the meetings at the material times as representatives of the defendant and had given undertaking to the plaintiff that the defendant will execute a Corporate Guarantee in consideration of the Term Loan Facility for MPI.

[43] It is noted that in the case of *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221, Mohamed Azmi SCJ (as he then was) at p. 223 held that:

It is essential to appreciate the scope of s. 114(g) test it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. *It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.*

(see also *Plenitude Holdings Sdn. Bhd. v. Tan Sri Khoo Teck Puat & Anor* [1992] 4 CLJ 1882; [1992] 3 CLJ (Rep) 281; *Chan Yoke Lain v. Pacific & Orient Insurance Co Sdn Bhd* [1999] 1 CLJ 179).

[44] As such, there is no obligation on the defendant to call Mr. Ong Boon Poh or Mr. Bernard Foo when the plaintiff has no documents and no witness to evidence the defendant's participation or agreements in the meetings. It is implausible that the plaintiff who is giving out a Term Loan of RM40,000,000 does not have documents that conclusively show that the defendant, not only attended, but agreed to give the Corporate Guarantee. The court finds that the compelling and irresistible conclusion is that the defendant's representatives neither attended any of the meetings nor agreed to give a Corporate Guarantee to the plaintiff.

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A The Defendant's Resolution

[45] The plaintiff has further premised its claims on the defendant's resolutions as evidence to show that the defendant, through its representatives, did give the undertaking to the lenders at the meetings leading to the availment of the Term Loan Facility. Otherwise according to the plaintiff, it would be rather perplexing as to why the wordings of the resolutions suddenly make reference to an "undertaking to execute a Corporate Guarantee" when indeed MIMB's Letter of Offer dated 14 September 2000 does not specifically mention the undertaking.

[46] PW2 testified that the plaintiff had the resolution before the disbursement of the Term Loan otherwise it could not have disbursed the Term Loan Facility.

[47] As evidence that the undertaking to the lenders was authorised and empowered by the Board of Directors and is therefore valid and binding on the defendant, learned counsel for the plaintiff relied on the case of *Pembinaan Bumi Gemilang Sdn Bhd v RHB Bank Berhad & Anor* [2009] 1 LNS 1006. In that case the court held that:

While it is undeniable that resolutions are internal matters, and may be unilaterally revoked, varied or altered in any manner deem fit by the company passing the resolution in the first instance, in relation to and in the context of relationships with third parties, resolutions may have and often do have, entirely different application and interpretation. Resolutions, if properly passed, are evidence of decisions taken at board meetings. Subject to the contents therein, resolutions frequently impact on the relationship of the company inter se and with parties other than the company. It is in the light of the relationship with third parties that these resolutions are relevant and must now be examined. It may very well be the Plaintiff's resolve to make any particular decision. But, that is not the end of the matter. How that decision ultimately impacts is to be considered having regard to the context and role it was placed at the outset.

[48] On the contrary, according to DW1, the plaintiff could not have disbursed the loan relying on this resolution as the said resolution was never in the plaintiff's custody at the time the term loan was disbursed to MPI. It is the defendant's position that a copy of the resolution was in fact obtained by the plaintiff only some time in June 2002, more than one and half years after the loan was disbursed by the plaintiff to MPI.

[49] The court notes that the it is not in dispute that the MIMB had in its possession the original copies of the defendant's resolutions dated 14 September 2000 signed by DW2 and Syed Ahmad bin Syed Salim which resolved, *inter alia*, as follows:

That in consideration of ... Malaysian International Merchant Bankers ("MIMB") ... and Malaysian Industrial Development Finance Berhad ("MIDF") ... *vide* MIMB's Letter of Offer dated 14 September 2000 agreeing to grant the Term Loan Facility ("the Facility") of up to RM40.0 Million to May Plastics Industries Berhad ("MPI") for the purposes of financing the early redemption of MPI's RM40.0 Million 3.5% Guaranteed Redeemable Bonds 1996-2001 maturing on 3rd September 2001, the Company do hereby undertake to execute a Corporate Guarantee for up to RM40.0 Million, in favour of MIMB to secure the said Facility, upon such terms and conditions as are stipulated in the Deed of Guarantee.

[50] However, the key issue that the court has to consider is whether when the Term Loan was disbursed to MPI, the defendant had given the defendant's resolution to the plaintiff. On this issue, the court finds that by its letter dated 18 April 2002 the plaintiff wrote to MPI requesting a copy of the resolution. As such the court finds that the said request clearly supports the defendant's case that the plaintiff did not have the resolution prior to the disbursement of the Term Loan as otherwise they would not have had to ask for the resolution.

[51] It is also pertinent to note that DW3 in his evidence said that it was some time after 10 May 2002 that he personally received a request by telephone from someone at MIMB for the extract of the director's resolutions dated 14 September 2000 since the bank did not have in their custody copies of the said director's resolutions.

[52] The court also finds that the plaintiff has not adduced any contemporaneous documentary evidence whatsoever to show when, how and from whom it received the resolution and in particular, that they received the resolution before the disbursement of the Term Loan as alleged. The plaintiff's failure to explain how and when exactly they received the said resolution support the defendant's position that the plaintiff did not have the resolution when it disbursed the loan. This is what PW1 said:

A Q102. Was there a covering letter forwarding this resolution?

A102. There's no covering letter.

B [53] Upon considering the totality of the evidence adduced and the documentary evidence submitted, the court finds that on the balance of probabilities the resolution had not been given to the plaintiff when the Term Loan was disbursed to MPI by the plaintiff. There can be no other reasonable or logical explanation for the repeated requests for a resolution.

C [54] The defendant has referred the court to the case of *Lam Eng Rubber Factory (M) Sdn. Bhd. v. Lim Beng Yew & Ors* [1994] 4 CLJ 376, as an authority for the proposition that the resolution is an internal document and does not *ipso facto* create a contract with a third party.

D [55] In the case of *Lam Eng Rubber Factory (M) Sdn. Bhd. (supra)* the plaintiff claimed certain sums of money which is allegedly advanced to the defendants. It relied on *inter alia*, a director's resolution to the effect that the company would advance a sum totalling RM360,000 without interest to various directors and shareholders. In that case, KC Vohrah J (as he then was) held as follows:

F I fail to see how the resolution can be considered as a contract between the plaintiff company and its new shareholders. That the document shows that it is a resolution signed by three directors stating that the company 'do hereby make an advance' to the directors and shareholders does not indicate that it is a contract. Nowhere in P1 is it shown that there was an offer to lend money by the plaintiff company and that the offer was accepted by the defendants. More specifically, there is nothing in the resolution which shows that 'at the request of the defendants the plaintiff advanced and the defendants borrowed ...' certain sums of money as averred in para 5 of the statement of claim. I fail to see how either s. 91 or s. 92 of the Evidence Act 1950 can be invoked.

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H [56] Applying the decision in *Lam Eng Rubber Factory (M) Sdn. Bhd. v. Lim Beng Yew (supra)* to the present case, it is clear that the resolution is an internal document of the defendant authorising and empowering the defendant to do and carry out matters stipulated therein. It does not however require or compel the

I defendant to do or carry out any of the matters stated therein.

[57] Thus, it would therefore be clearly wrong in law for this court to accept the plaintiff's contention that the resolution is an undertaking given by the defendant to the plaintiff capable of being specifically enforced. (See *Lam Eng Rubber Factory (M) Sdn Bhd (supra)*; *Abdul Rahim Syed Mohd v. Ramakrishnan Kandasamy*; *Wan Ahmad Azlan Wan Majid & Anor (Intervenors)* [1996] 3 CLJ 393.

[58] By law the resolution has no legal binding effect *vis-a-vis* the company, the defendant in this case, and a third party, the plaintiff in this case. It does not create any legal relationship between the plaintiff and the defendant.

[59] In my judgment on the balance of probabilities, the defendant did not at any time whatsoever enter into any contractual relationship with the plaintiff *vis-a-vis* the Term Loan Facility and neither did it give the defendant any undertaking whatsoever to execute a Corporate Guarantee in favour of the plaintiff as alleged by the plaintiff. PW1 confirms in answer to Question 52 that the plaintiff did not have a contract with the defendant.

[60] The only undertaking the plaintiff had *vis-a-vis* the Corporate Guarantee was the undertaking given by MPI in cl. 11.3 of the Term Loan Agreement to procure the execution of a Corporate Guarantee by the defendant. This is confirmed by PW1 in her answer to Question 48.

The Defendant's Prospectus

[61] The plaintiff had also relied on the defendant's Prospectus dated 30 March 2003 as corroborative evidence to show that the defendant did give an undertaking to provide a Corporate Guarantee to the defendant. Section 10.3 (at p. 284 of bundle B) of the Prospectus states that one of the contingent liabilities of the defendant was the Corporate Guarantee to be provided by the defendant in favour of the lenders.

[62] Learned counsel for the plaintiff contended that whilst the Prospectus was prepared by MIMB Advisory, the contents of such Prospectus were verified by the directors of the defendant who clearly accepted full responsibility for the accuracy of the information provided therein (p. 264 of bundle A).

A [63] In this present case, the court notes that MIMB and the plaintiff were advisors of the Proposed Scheme and prepared the defendant's Prospectus. It cannot be denied that they were conversant with all the material facts pertaining to the Corporate Guarantee and were aware that the Corporate Guarantee had not
B been executed by the defendant at the material time. Thus, in my view, the plaintiff not only had full knowledge that the statements were false, they were also responsible for the falsity of the statements. Paragraph 7 of the Prospectus (p. 204 of bundle B) states as follows:

C MIMB acknowledges that, based on all available information, and to the best of its knowledge and belief, this Prospectus constitutes a full and true disclosure of all material facts concerning the Offer for Sale.

D [64] Thus, in my judgment, the statements are not and cannot be construed in law, as an undertaking and/or representation given by the defendant to the plaintiff to provide the Corporate Guarantee.

Terms Of The Corporate Guarantee

E [65] In the present case, the court notes that the draft Guarantee and Indemnity prepared by the plaintiff's solicitors Messrs Nik Hussain & Partners dated 3 September 2002 incorporated about ten (10) main clauses. Learned counsel for the plaintiff submitted that the draft guarantee given by the defendant already sets out the
F essential terms of the Corporate Guarantee:

- (i) The identity of the parties to the guarantee – the Corporate Guarantee was to be provided by the defendant, as guarantor, in favour of MIMB (agent for itself and MIDF), as guarantee.
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- (ii) The amount guaranteed – a sum of up to RM40,000,000.
- (iii) The consideration for the guarantee – Lenders agreeing to grant a Term Loan Facility ("the facility") of up to RM40,000,000 to May Plastics Industries Berhad ("MPI") for the purposes of financing the early redemption of MPI's RM40,000,000 3.5% Guaranteed Redeemable Bonds 1996-2001 maturing on 3rd September 2001.
H
- (iv) The purpose of the guarantee – as security for the term loan facility.
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- (v) Other terms and conditions – to be contained in a deed of guarantee.

[66] The plaintiff's case is that given that the defendant's undertaking sets out the essential terms of the guarantee to be provided by the defendant in favour of MIMB, as shown in para. 70 above, there is a valid and enforceable agreement between the parties although the specific terms and conditions of the Deed of Guarantee/Corporate Guarantee was not agreed upon. In this regard, learned counsel for the plaintiff made reference to the Federal Court decision in *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625 where the court held that there was a binding agreement between parties based on the correspondence letters exchanged between parties although the formal sale and purchase agreement was not executed because the parties to the transaction, the property, the price and the essential terms were identified with sufficient certainty. It was further held that the phrase 'subject to the sale and purchase agreement' did not point to an intention that no contract was to come into existence until a formal sale and purchase agreement had been prepared and executed.

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[67] In this instant case, the plaintiff seeks for an order that the defendant specifically performance its undertaking to execute a Corporate Guarantee by signing and returning the Guarantee & Indemnity, given that the defendant is estopped from challenging the form and substance of the Draft Guarantee & Indemnity (pp. 375-397 BOD).

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[68] The defendant however contended that they had never agreed to the terms and conditions of the draft guarantee and indemnity and the plaintiff failed to present any evidence that indicates that the terms and conditions of the draft guarantee and indemnity have been accepted and agreed by the defendant. It was further submitted by the defendant that the parties have never reached consensus ad idem and that the guarantee was to be executed in a formal contract. Learned counsel for the defendant referred the court to the Supreme Court's decision in *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133, a case where the primary issue was whether there was a concluded contract between the appellant as employer and the respondent as contractor.

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[69] Edgar Joseph Jr SCJ (as he then was) delivering the judgment of the court in *Ayer Hitam* case held at p. 139 as follows:

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- A The existence of an agreement depends upon the intention of the 'parties' and that for there to be an agreement the parties must be *ad idem* who must be *ad idem*, there ie must be a consensus between them ... authorities show that such inference must be drawn. It may be inferred from the language used, the parties' conduct having regard to the surrounding circumstances and the object of the contract.
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- [70] The test set-out by Edgar Joseph SJC was adopted by the High Court in the case of *Abdul Rahim bin Syed Mohd v. Ramakrishnan Kandasamy; Wan Ahmad Azlan bin Wan Majid & Anor (Interveners)* [1996] 3 CLJ 393. This is what was said in the High Court:
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- It however, must be stressed that each case must be decided on its own facts. This is especially so in cases dealing with preparatory agreements where the intention of the parties plays a crucial role in determining its effect. In each case, it is the duty of the court to determine not only the nature of the document, but also the true intention of the parties at the time the document was execute – whether the parties intended to be bound by any contract immediately, or only on the fulfilment of certain conditions, eg the execution of a formal contract.
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- [71] In the case of *Abdul Rahim bin Syed Mohd (supra)*, the court also relied on the *dictum* of Sir Garfield Barwick in the Privy Council decision of *Daiman Development Sdn Bhd v. Mathew Lui Chin Teck & Another Appeal* [1980] 1 LNS 180; [1981] 1 MLJ 56, where his Lordship made the following observation at p. 58:
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- The question whether parties have entered into contractual relationships with each other essentially depends upon the proper understanding of the expressions they have employed in communicating with each other considered against the background of the circumstances in which they have been negotiating, including in those circumstances the provisions of any applicable law. Where they have expressed themselves in writing the proper construction of the writing against that background will answer the question. The purpose of the construction is to determine whether the parties intend presently to be bound to each other or whether, no matter how complete their arrangement might appear to be, they do not so intend until the occurrence of some further event, including the signature of some further document or the making of some further arrangement. The question is one as to expressed intention and is not to be answered by the presence or absence of any particular form of words.
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[72] It is pertinent to note that in certain exceptional cases where the intention of the parties is clearly established, an immediately binding contract may come into force, even though a formal agreement is to be executed subsequently as Edgar Joseph Jr SCJ (as he then was) observed in *Ayer Hitam* case at p. 140:

True it is that merely because the parties contemplate the preparation of a formal contract, that by itself will not prevent a binding contract from coming into existence before the formal contract is signed. It is not difficult to cite an anthology of cases for this proposition but we need no more than refer to *Von Hatzfeldt-Wildenburg v. Alexander* r. 3 at pp. 288, 289 where the court said this:

It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and reference to the more formal document may be ignored.

[73] Further down at p. 141 his Lordship states:

But it is now well settled that when an arrangement is made 'subject to contract' (see *Rossdale v. Denny*) or 'subject to the preparation and approval of a formal contract' (see *Winn v. Bull*) and similar expressions, it will generally be construed to mean that the parties are still in a state of negotiation and do not intend to be bound unless and until a formal contract is exchanged.

[74] In *Ho Kam Phaw v. Fam Sin Nin* [1998] 3 CLJ 708, the Court of Appeal in considering whether there was in existence a contract when only drafts were exchanged had this to say:

The facts found by the trial judge and the evidence led establish conclusively that when Ho and Fam instructed their respective solicitors, each of them had in mind that their differences would be resolved by a formal agreement in writing to be drafted by Max, which was to be approved by each of their solicitors, and that Ho and Fam each intended to contract with the other by a document which each of them will be required to sign. In such a situation, nothing short of signing the document by both parties could bring a contract into existence.

- A In such circumstances, the rule is that ... even although the terms to be included in the documents have been agreed, there is no contract and each party has a *locus poenitentiae* until at least execution on both sides.
- B These concepts are not new. Reference can be made to the standard text books as well as *Carruthers v. Whitaker* [1975] 2 NZLR 667, and *Concorde Enterprises Ltd v. Motors (Anthony Hutt) Ltd* [1981] 2 NZLR 385, as well as *Shell Oil v. Wordcom Investments* [1992] 1 NZLR 129.
- C Therefore, in all the circumstances of this case, my view is that even of as Murthi contends, all the terms had been agreed, there is no contract here because Fam did not sign it.
- [75] Similarly, in *Crossley v. Maycock* [1874] 43 LJCH 379 Sir George Jessel MR said this:
- D If the agreement is made subject to certain conditions then specified or to be specified by the party making it or his solicitor, then until those conditions are accepted, there is no final agreement such as the court will enforce.
- E [76] In the present case, based on the evidence adduced the court finds that none of the documents relied on by the plaintiff showed an *ad idem* between the parties on the terms and conditions of the draft guarantee and indemnity. As such, I am of the view that there were no terms and conditions that were agreed or a standard
- F guarantee or a draft guarantee that the defendant was bound to execute.
- G [77] It must be emphasized that only on 10 July 2002 M/s Nik Hussain & Partners sent a specially drafted document entitled guarantee and indemnity which was a “Draft” “for your perusal and approval” and with an invitation to “revert to us with your approval to the said draft”. The subsequent letter dated 22 July 2002 also invited the defendant to “revert to us with your comments”.
- H [78] In my judgment, in regard to the second paragraph of M/s Nik Hussain & Partner’s letter dated 10 July 2002 and 22 July 2002, the only possible inference of fact that could reasonably be drawn concerning the draft guarantee and indemnity was that it was an offer by M/s Nik Hussain & Partner to settle on the terms of the draft guarantee and indemnity and no more. The defendant did
- I not accept the offer and did not sign the guarantee and indemnity. Thus, there was no contract binding on the defendant.

[79] It appears to me that the parties have never reached consensus *ad idem* and that even the plaintiff contended that the guarantee was to be executed in a formal agreement. In such a situation “nothing short of signing the document by both parties could bring a contract into existence”.

Conclusion

[80] After looking at the totality of all the evidence adduced on the issue of whether the defendant had given an undertaking to the plaintiff to provide a Corporate Guarantee as consideration for the term loan granted to MPI, the court finds that the plaintiff has not succeeded in proving on a balance of probabilities, that the defendant had given such undertaking. Where there is no written agreement and the fact of the undertaking is in dispute, the court will have to look at all the facts as well as the evidence afforded by contemporaneous documents to attempt to decide the true situation. The court finds that the evidence as adduced does not support the plaintiff's contention that the defendant has given the undertaking to the plaintiff.

[81] In conclusion, the court finds that the plaintiff has not made out a case against the defendant on a balance of probabilities. Accordingly, the plaintiff's case against the defendant is dismissed with costs.

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